U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 23 July 2004

CASE NO.: 2002-LHC-01179

OWCP NO.: 18-76035

In the Matter of:

ABEL ROSALEZ,
Claimant,

v.

UNITED STATES NAVY EXCHANGE,
Permissibly Self-Insured Employer,

and

CRAWFORD & COMPANY,
Administrator.

Appearances:

Mr. James D. Coalwell, Esq.,
For the Claimant,

Mr. William S. Brooks, Esq.,
For the Employer/Administrator

Before: GERALD M. ETCHINGHAM
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND ATTORNEY FEES

This matter arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (the "Act"), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq*. Claimant Abel Rosalez ("Claimant") seeks compensation and medical benefits for bilateral wrist injuries sustained in the course and scope of his employment as a mechanic with the United States Navy Exchange ("Employer"). Claimant also seeks penalties under section 914(e) of the Act, and further alleges that Employer violated Section 48(a) of the Act.

Claimant's Exhibits 1 through 14, and Employer's Exhibits 1 through 9, 11 and 12, were admitted into evidence at the formal hearing held October 29, 2003 in Long Beach, California.[1] TR at 10-16, 38, 115-16. Claimant's Exhibit 1, pp. 9-12, a September 28, 2001 informal conference memorandum by a Department of Labor Claims Examiner, was objected to by Employer as being irrelevant and inadmissible as notes from a settlement conference. After further review, I overrule Employer's objection to CX 1, pp. 9-12 and admit it into evidence for the limited purpose of determining whether Claimant's alleged noncompliance under Section 7(d)(2) of the Act is excused by the District Director in the interest of justice.[2] In addition Claimant objected to EX 13 on grounds that it was untimely filed. TR at 24-27. Claimant's counsel later agreed to withdraw his objection to EX 13 if he could depose Joyce Johnson, which occurred as reflected in CX 21 and as referred to hereafter. TR at 27. As a result, EX 13 is admitted into evidence. Claimant and Employer's Pre-Hearing Statements, Witness Lists and Amendments thereto were also admitted at the hearing and identified as Administrative Law Judge Exhibits "ALJX" 1 through 3. TR at 38-39.

All parties were represented by counsel, and at the close of the hearing the record was left open for the submission of specific post-trial depositions and closing briefs. TR at 33-35. Both counsel for Claimant and Employer submitted closing briefs which I have marked and admitted into evidence as ALJX 4 and ALJX 5, respectively. By Order issued April 16, 2004 (the "April 16 Order"), I allowed the submission into evidence of Claimant's late-submitted CX 15, consisting of a medical report by Dr. Salick dated November 26, 2003, and his January 7, 2004 examination notes of Claimant, as well as CX 22, comprised of the illegible handwritten progress notes and prescriptions of Dr. Sherman for the months of November 2003 through April 2004. The post-trial depositions of Dr. Charles Brenner; Dr. Adam Sherman; Ms. Joyce Johnson (CX 19-21); Ms. Lorika Loumakis, Dr. Richard Rosenberg; and Mr. Kevin Comer (EX 14-16) are admitted into the record and identified hereinafter as CX 19 through 21 and EX 14 through 16, respectively. Also, Employer's counsel objected to Exhibit 2 accompanying CX 21, a December 11, 2003 psychometric assessment of Claimant, on grounds that it was submitted outside of the discovery cutoff date. CX 21 at 9. I overrule this objection as Ms. Johnson is entitled to rely on such a report for the basis of her opinions. Finally, ALJX 6, is marked and admitted into evidence as a May 6, 2004 letter from Employer's counsel that expressed Employer's waiver of its right to have Claimant examined by a rheumatologist or vascular specialist of its choosing in response to my April 16 Order and concurrently closed the record in this case.[3]

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[1] References to the hearing transcript are indicated by "TR;" Claimant and Employer's Exhibits are referred to as "CX" and "EX," respectively. EX 10, Claimant's deposition transcript, was admitted at trial for the limited purpose of impeachment.

[2] The Board has held that the authority to determine whether non-compliance with Section 7(d)(2) may be excused rests with the district director and not the administrative law judge. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986); *Force v. Kaiser Aluminum & Chemical Corp*., 23 BRBS 1 (1989), a*ff'd* in pertinent part, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); 20 C.F.R. §702.422..

[3] This decision was delayed due to Claimant's counsel's late submittal of new evidence on April 14, 2004 (CX 22) which reopened discovery for limited purposes until Employer's May 6, 2004 letter gave notice to all that the record could close and no additional discovery was necessary to complete this case. *See* ALJX 6.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. The Act is applicable to Claimant's claim;
2. Claimant sustained two injuries to his right and left wrist in the form of bilateral carpal tunnel syndrome as of May 30, 2001;
3. An employer/employee relationship existed at the time of the injuries;
4. The alleged injuries arose out of and in the course of Claimant's employment with Employer;
5. Claimant timely noticed and filed his claim;
6. Claimant's average weekly wage at the time of injury is subject to calculation pursuant to section 910(c) of the Act;
7. Employer is not seeking Special Fund relief; and
8. This claim does not involve any allegation that Claimant is seeking compensation or medical benefits from Employer on the basis of any alleged work-related psychological condition.

TR at 39-42, 115; ALJX 1; ALJX 2; ALJX 5 at 2. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

ISSUES FOR RESOLUTION

The unresolved issues in this matter are:

1. Whether there is any causal relationship between Claimant's Raynaud's phenomenon and/or his reflex sympathetic dystrophy illness ("RSD") and his work-related bilateral carpal tunnel syndrome such that Claimant is entitled to temporary total disability payments from April 18, 2003 and continuing;
2. The nature and extent of Claimant's disability;
3. Whether Claimant reached maximum medical improvement for bilateral wrist conditions;
4. Claimant's average weekly wage;
5. Claimant's entitlement to medical expense reimbursement under Section 7 of the Act;
6. Whether Section 14(e) penalties are warranted against Employer;
7. Whether Employer is liable to Claimant for discriminatory conduct under Section 48a of the Act such that (a) Claimant was treated differently regarding his seniority than non-injured workers; and (b) Employer acted with the discriminatory animus against Claimant for filing his claim under the Act.

SUMMARY OF CONCLUSIONS

Claimant is awarded temporary total disability benefits for the periods of November 25, 2002 through February 2, 2003 and April 18, 2003 through July 16, 2003. Claimant's request for additional temporary total disability benefits is denied as there was no evidence presented that

established that Claimant's Raynaud's phenomenon or RSD condition were caused by his employment with Employer. The opinions of orthopedic surgeon Dr. Rosenberg and treating orthopedic surgeon physician Dr. Brenner represent specific and comprehensive evidence sufficient to sever the connection between Claimant's June 2001 injury and his employment. These medical opinions are credited over the opinions of disability analyst/rheumatologist Dr. Salick and treating family osteopath Dr. Sherman with respect to the lack of causal connection between Claimant's work-related carpal tunnel syndrome and his current Raynaud's phenomenon or RSD condition.

FINDINGS OF FACT

Claimant, born February 11, 1957, is a resident of Ventura, California and worked as an automobile mechanic with Employer for approximately 13 years. TR at 51-52. In this capacity, Claimant, who is ambidextrous, performed necessary repairs such as brake jobs and transmission replacements on small passenger cars and large cargo trucks, which required heavy lifting and the use of torque wrenches. TR at 52-53; CX 2 at 15.

Claimant's work with Employer was a commission position with a minimum hourly rate guaranteed so that if business was slow or if Claimant missed work through sick or annual leave, he earned the "prevailing rate" which, at the time, approximated $11 per hour for 8 hours of work. Otherwise, Claimant split his mechanic fees evenly with Employer subject to the $11 per hour minimum. TR at 77; CX 6 at 83.

Claimant and his supervisor, Jo Posca, had problems or disagreements prior to his claim in this case in June 2001. TR at 72-73. In fact, Claimant was reprimanded by Employer several times dating to at least 1998. TR at 73. From 1999 to March 28, 2001, however, Claimant received a "fully successful" rating for his work. TR at 73-74; CX 6 at 70-73. On May 4, 2001, Claimant received a letter of caution from Employer advising him to follow the proper chain of command rather than repeat Claimant's conduct from March 21, 2001 and to report future problems to Claimant's immediate supervisor, Jo Posca. EX 9 at 30.

On May 30, 2001, Claimant reported pain and weakness in both hands to Dr. George L. Vannix. CX 2 at 13-16. Dr. Vannix performed blood tests and administered pain relievers, and ultimately concluded that the repeated demands of Claimant's work as a mechanic caused the hand pain. CX 2 at 17. Dr. Vannix diagnosed bilateral carpal tunnel syndrome, and referred Claimant to a specialist such as a rheumatologist or orthopedist. CX 2 at 13-21. Dr. Vannix prescribed pain medication for Claimant, opined that Claimant could continue to work 8 hours per day but with lifting restrictions not to exceed 10 pounds. CX 3 at 19.

Upon referral from Dr. Vannix, Claimant subsequently underwent an EMG exam of both hands with Dr. Patrick L.S. Kong, which returned normal results. CX 2 at 23-26.

Claimant testified that he provided Employer with copies of his medical reports from Dr. Vannix in May – July 2001. TR at 107. He further testified that Employer took no action in response to the reports. *Id.* I find that Claimant's testimony was credible with respect to the

submitted medical reports of Dr. Vannix and is corroborated by Mr. Comer's testimony. See EX 16 at 40.

In August 2001, Dr. Adam B. Sherman, a family practitioner, began treating Claimant as Dr. Vannix had retired. TR 56; CX 20. Dr. Sherman also diagnosed Claimant with bilateral carpal tunnel syndrome finding both a positive Tinel's sign and Phalen's test bilaterally, and treated Claimant with pain relievers such as Vicodin and Motrin. CX 3 at 28-36. Subsequently, Claimant was referred to Dr. Charles Brenner, a board-certified orthopedic surgeon since 1981, who first examined Claimant on February 27, 2002. CX 19 at 5-6 and EX 1 attached thereto.

On February 27, 2002, Dr. Brenner examined Claimant who complained of numbness, pain and aching in his hands. EX 7 at 6. Dr. Brenner reviewed Claimant's records, examined him and diagnosed bilateral carpal tunnel syndrome, despite the previous negative EMG test. EX 7 at 7. Objectively, Dr. Brenner found that Claimant had a mild thenar atrophy on the right, and a positive Tinel and Phalen's bilaterally with no evidence of triggering of his fingers. EX 7 at 7. In addition, Claimant had a full range of motion of the fingers with 0 tip to palm and 0 tip to table motion. *Id*. Also, Claimant had grip strengths of 65 pounds bilaterally and normal 2 point discrimination. *Id*. Dr. Brenner recommended a right carpal tunnel release, noting that Claimant could continue to work until the date of that surgery, but would need six weeks after the surgery to recover. *Id.*

Claimant was scheduled for right carpal tunnel release surgery for April 15, 2002 but cancelled surgery so he could resolve his workers' compensation situation. CX 4 at 54-57.

In September 2002, Claimant was suspended without pay for a month pending disciplinary action, because of a claim of sexual harassment against him. TR at 74-76. Through his union, Claimant later discovered that an employee whodelivered auto parts to service the vehicles worked on by Claimant had alleged sexual harassment against him. TR at 76. After further investigation, the charges were dropped in their entirety and Claimant was reimbursed for his lost wages. TR at 103-104. Claimant found no evidence that the sexual harassment claim was related to his claim in this action. *Id.*

Dr. Brenner saw Claimant on November 21, 2002 and repeated his opinion that Claimant would be temporarily totally disabled as a mechanic for approximately six weeks from the date of right carpal tunnel release surgery until January 6, 2003 but could return to work sooner if lighter one-handed work was available. EX 7 at 9. On examination, Claimant had positive Tinel and Phalen's bilaterally with full range of motion of the fingers and normal two-point discrimination. EX 7 at 8.

Dr. Brenner performed the right carpal tunnel release on November 25, 2002, after an unexplained delay in receiving authorization for the procedure. TR at 58; EX 11 at 139.

Dr. Brenner examined Claimant on January 6, 2003, releasing him to full-time, unrestricted work as of February 3, 2003. EX 7 at 10-12. Dr. Brenner recommended that Claimant wear padded gloves on his return to work. TR at 59; EX 7 at 10.

Claimant gave no explanation as to his delay in acquiring the recommended padded gloves in a timely manner. After acquiring the padded gloves on February 5, 2003, Claimant returned to work. TR at 60. Upon his return to work, Claimant decided to go home for reasons unrelated to his right wrist surgery. TR at 61-63.

On February 14, 2003, Dr. Brenner reexamined Claimant, who reported that his right hand was doing well but that he continued to experience numbness and tingling in his left hand. EX 7 at 11-12. Claimant told Dr. Brenner at that time that he had complete relief of his right hand/wrist symptoms after the right carpal tunnel release, with no problems outside of mild discomfort in the area of the scar. TR at 82. Dr. Brenner opined that Claimant had no problems with his right hand outside of mild discomfort in the area of the scar. CX 19 at 37-38. In addition, Dr. Brenner tested Claimant and found him to have grip strength of 60 pounds on the right compared to 75 pounds on the left with positive Tinel and Phalen's on the left, but with normal two point discrimination of both fingers. EX 7 at 12. Dr. Brenner also confirmed that he had released Claimant to full work duties. *Id.*

Also in February 2003, Dr. Brenner repeated his diagnosis of bilateral carpal tunnel syndrome, and recommended that Claimant undergo a left carpal tunnel release. EX 7 at 12. Dr. Brenner further opined that Claimant would be temporarily totally disabled for six to eight weeks following the surgery to Claimant's left wrist. *Id.* Dr. Brenner also commented that Claimant did not return to work after his attempt on February 5, 2003, "as there are other issues going on at work and he [Claimant] apparently cannot return to work at the present time, but this is not related to his right hand." *Id* .

At trial, Claimant testified that because of his perceived "harassment," he was "having to go on the anti-anxiety pills and anti-depression pills from Dr. Sherman." TR at 61-63, 87. Claimant further testified that he went to see Dr. Sherman on or about February 5, 2003, for reasons unrelated to his carpal tunnel problems. TR at 84.

Claimant also testified that he did not recall submitting any prescriptions, medical reports, or bills to Employer from January through April 2003 other than Dr. Sherman's prescriptions for Claimant's anti-anxiety and depression. TR at 108-109. Claimant further testified that from February 2003 through April 2003, he never got any medical documentation or disability slips stating that he should be off work for that period of time. TR at 91. In addition, Claimant testified that he did not know when Dr. Brenner contacted Employer seeking authorization to do the left carpal tunnel release surgery. TR at 91-93.

On April 18, 2003, Dr. Brenner performed carpal tunnel release surgery on Claimant's left wrist. TR at 67; CX 11 at 125-27; CX 19 at 33. After the April 2003 surgery, Claimant testified that the tingling and numbness symptoms in his left hand, typical of carpal tunnel, went away. TR at 68; CX 19 at 10. Dr. Brenner opined that he expected that Claimant would be off work until June 9, 2003, due to the left carpal tunnel release surgery. CX 11 at 126.

In late April or May, 2003, Claimant testified that he experienced new symptoms in his right hand involving redness, swelling and discoloration. TR at 97-98, 100.

Dr. Brenner saw Claimant again on June 6, 2003, and reported that Claimant's status post left carpal tunnel release surgery condition was improving. Claimant's recorded grip strength measured 80 pounds for the right and 42 pounds on the left. CX 19 at 47-48. Dr. Brenner did not note any redness, swelling or discoloration. Dr. Brenner recommended that Claimant continue with his medication and occupational therapy 2 to 3 times per week for 4 to 6 weeks and revised his opinion that Claimant could return to work on July 14, 2003 without any restrictions but was not yet permanent and stationary but no permanent restrictions were contemplated. CX 11 at 119-21; CX 19 at 30.

On June 18, 2003, I issued my Notice of Hearing in this case to the parties setting October 27, 2003, as the calendar call date for hearing in Long Beach, California.

Dr. Brenner next examined Claimant on July 16, 2003. Dr. Brenner testified that Claimant had complained of aching in his hands and reported to Dr. Brenner that he did not feel he could do his job because his hands were painful and weak. CX 19 at 31-32. Later, Dr. Brenner clarified his testimony and stated that Claimant told him on July 16, 2003 that the Volteren medication had helped with Claimant's aching in his hands and his numbness had completely resolved. CX 19 at 32. In addition, Dr. Brenner reported that Claimant told him that he was concerned that when he returned to work as a mechanic, his pre-surgery symptoms would recur. *Id*. Dr. Brenner recorded Claimant's grip strength at 90 pounds on the right and 80 pounds on the left. CX 19 at 47-48.

Dr. Brenner also testified that Claimant's subjective complaints at this time may have resulted in Dr. Brenner's revised opinion that Claimant would probably need vocational rehabilitation. CX 19 at 32. Dr. Brenner also revised his work status opinion for Claimant stating that Claimant could return to work on July 21, 2003 for 2 to 4 hours a day for 4 weeks and 8 hours a day if Claimant was able thereafter scheduling Claimant to return for examination in 6 to 8 weeks for a determination for permanent and stationary condition. CX 11 at 114-15. Dr. Brenner testified that he would normally wait 3 to 4 months after a carpal tunnel release surgery before diagnosing a permanent and stationary condition status. CX 19 at 33. This is in contrast to Dr. Brenner's opinion after Claimant's right carpal tunnel release surgery on November 25, 2002, where Dr. Brenner diagnosed Claimant's permanent and stationary condition status less than two and a half months later on February 3, 2003. EX 7 at 10-12; *See also* EX 7 at 9 (Dr Brennan opined TTD for approximately 6 weeks from surgery).

Rather than waiting 6 to 8 weeks to return to Dr. Brenner, Claimant returned to him on August 6, 2003. CX 11 at 112-13. At that visit, Claimant reported that he tried to wean off his pain medication and his symptoms got worse. CX 19 at 33. Claimant also told Dr. Brenner that the cramping and aching in his hands had worsened, he experienced a constant dull aching, numbness, and weakness in both hands and was not able to return to work 2 to 4 hours per day as requested. *Id*. Claimant's recorded grip strength at this time was 85 pounds in the right and 75 pounds in the left hand. CX 19 at 47-48. At this visit, Dr. Brenner changed his treatment plan and Claimant's work status to authorize a work hardening program and opined Claimant was unable to work at that time. CX 11 at 112. Dr. Brenner scheduled Claimant to return in 2 months. *Id*.

On September 4, 2003, at Employer's request, Dr. Richard Rosenberg, a board certified orthopedic surgeon since 1983, performed an independent medical evaluation of Claimant. EX 6; EX 11 at 103. Claimant testified that he saw Dr. Rosenberg for 2 minutes. TR at 101, 111-113. Dr. Rosenberg testified that the examination took between 30 to 40 minutes. EX 15 at 7, 9.

In his report dated October 2, 2004, Dr. Rosenberg noted that Claimant complained of an "ache, redness, burning sensation and swelling" in both hands. EX 6 at 5(c). Dr. Rosenberg examined Claimant and reviewed Claimant's medical records, and noted that Claimant had overall slight puffiness on the volar surface of his hands, although no real swelling. *Id*. Dr. Rosenberg found Claimant to be a heavy-set man weighing 262 pounds and standing 5 feet, 11 inches. EX 6 at 5c. Dr. Rosenberg further observed that Claimant had full range of motion of all of his fingers as well as full range of motion of both wrists with negative Tinel's sign over the carpal tunnel and over Guyon's canal bilaterally and a negative Phalen's test. *Id*. He also found Claimant with compression of the carpel tunnel bilaterally produced no discomfort with no intrinsic muscle atrophy of the hands and a full radial pulse. EX 6 at 5c and 5d. In addition, Dr. Rosenberg opined that Claimant had no increased or decreased sweat pattern of his hands and grip strength of 40/46/55 pounds on the right and 50/50/48 pounds on the left. EX 6 at 5d.

Dr. Rosenberg ultimately diagnosed: "1. Bilateral carpal tunnel syndrome treated with open carpal tunnel releases. 2. Signs of Raynaud's phenomenon of both hands." EX 6 at 5(c)-(f). Dr. Rosenberg opined that Claimant had reached a permanent and stationary status as of June 1, 2003, and that he had no permanent disability as a result of the carpal tunnel syndrome which was treated surgically. EX 6 at 5(g). He concluded that Claimant could return to work, unrestricted, and that the "suspect Raynaud's phenomenon…would not represent a work impairment or disability." *Id.*

On October 1, 2003, Claimant returned to Dr. Brenner. CX 11 at 111(c) and (d). At that time Claimant reported no change in his symptoms from his August 2003 visit. *Id*. Claimant's recorded grip strength was 60 pounds in the right and 55 pounds in his left hand. CX 19 at 48. In response, Dr. Brenner recommended vocational rehabilitation and a work hardening program in the interim and for Claimant to return to see him in 2 months when Dr. Brenner believed Claimant would be at a permanent and stationary condition. CX 11 at 111 (c). Since Dr. Brenner had earlier recommended Claimant for a work hardening program and authorization failed, Dr. Brenner believed that a repeated request for such would fail, so he also recommended vocational rehabilitation. CX 19 at 35.

On October 6, 2003, Employer terminated Claimant's employment due to his "prolonged absence." CX 12 at 152-53; EX 16 at 13. In his Notice of Termination for Prolonged Absence directed to Claimant, Mr. Kevin Comer, general manager for Employer, informed Claimant that "although [Employer was] sympathetic to your problem, unfortunately, you are still unavailable for work and the Autoport needs a regular full complement of associates to accomplish its work." CX 12 at 152(e). Mr. Comer testified, via deposition taken December 12, 2003, Claimant had worked with another mechanic, but that mechanic was responsible only for "light mechanical work" and lacked the certifications Claimant possessed. EX 16 at 8. Mr. Comer further testified that from 2001 through February 2003, Claimant had produced doctors' notes that excused his absences, but from February 2003 on, he had no information that "excused those absences from

that time period." EX 16 at 40. According to his letter dated August 27, 2003, giving a 30-day advance notice of proposed termination, Mr. Comer stated that Claimant had been absent from work since February 5, 2003 but "[t]he last medical report we received regarding your status was dated 6 August 2003 from Dr. Brenner…indicating that you are still unable to work." CX 12 at 153. Prior to this correspondence, Ms. Jo Posca, branch exchange manager and Claimant's direct supervisor, sent Claimant a letter dated February 27, 2003 directing Claimant to submit a doctor's certificate indicating the nature of his illness as well as the expected return to work date. CX 12 at 160. According to Mr. Comer, Ms. Posca had retired in March/April 2003, prior to Claimant's termination. EX 16 at 11.

On October 20, 2003, Claimant returned to see Dr. Brenner rather than waiting until December as directed for a reason unknown to Dr. Brenner. CX 19 at 38-40. Following the examination, Dr. Brenner opined that Claimant was at permanent and stationary status with permanent restrictions based on Claimant's participation in vocational rehabilitation at that time. CX 11 at 111(a)-(b); CX 19 at 39. Claimant's attorney in this action accompanied Claimant to see Dr. Brenner on October 20, 2003. CX 19 at 40. Dr. Brenner issued a permanent and stationary report. CX 11 at 152(a)-(d). Claimant reported that numbness and tingling were absent in both hands, but complained that his hands were weak and characterized by swelling and aching. CX 11 at 152(b).

Dr. Brenner also examined Claimant and reviewed the October 2, 2003 report by Dr. Rosenberg. *Id.* Dr. Brenner diagnosed both bilateral carpal tunnel syndrome, status post bilateral carpal tunnel releases, and "pain and swelling, both hands, possibly secondary to Raynaud's phenomenon." CX 11 at 152(c). Dr Brenner testified that after reviewing Dr. Rosenberg's October 2 report, Claimant's pain and swelling in both hands might possibly be attributable to Raynaud's phenomenon. CX 19 at 42. Dr. Brenner also commented that Claimant's subjective complaints, including weakness, swelling and pain, were "somewhat out of proportion with his objective findings," including weakness of grip strength and post-operative scars. CX 11 at 152(c)-(d). Dr. Brenner explained that Claimant's scars "appear to be well-healed, and there is no obvious swelling or deformity of the hands that can be seen," although Claimant complained of "swelling of his hands." CX 11 at 152(d). Dr. Brenner testified that despite Claimant's subjective complaints of pain and swelling in his hands, Claimant, objectively, "had good range of motion in his hands and reasonable grip strengths." CX 19 at 45-46. Dr. Brenner recommended a work-hardening program. *Id.*

On November 25, 2003, at Claimant counsel's request, Dr. Allen I. Salick, member of the Board of Disability Analysts since 2002, performed a rheumatologic consultation. EX 15 at 188, 205. Dr. Salick reviewed Claimant's medical records and examined him, finding that Claimant was status post operative bilateral carpal tunnel surgery and diagnosing "reflex sympathetic dystrophy [RSD], bilateral hands and wrists." CX 15 at 188-94. Claimant's recorded grip strength was 30 pounds in both hands. CX 15 at 193; CX 19 at 48. Dr. Salick explained that "reflex sympathetic dystrophy" is "an unusual condition, probably a neuritis which is seen most commonly after a penetrating injury and frequently after surgery." CX 15 at 194. Dr. Salick concluded that the condition was a complication of the carpal tunnel surgery, and because of it Claimant remained temporarily totally disabled. CX 15 at 194-95. He further observed that in his own experience, Claimant would "never be able to return to work as a mechanic or any other job

requires prolonged or repetitive use of his hand and wrists." CX 15 at 195. Dr. Salick recommended nerve blocks for treatment of Claimant's condition. *Id*

Dr. Brenner testified by deposition taken December 2, 2003. CX 19. He could not opine whether Claimant suffered from RSD, but would "defer to Dr. Salick." CX 19 at 15. Dr. Brenner also deferred to Dr. Salick regarding treatment with medication and nerve blocks, noting that such treatment would "probably" be reasonable. CX 19 at 16. Dr. Brenner also testified that there are numerous etiologies of RSD, including trauma, pain, and injuries. CX 19 at 15. He reasoned Claimant's condition was at maximum medical improvement "if there's no further medical treatment, specifically either the work-hardening program or treatment for the reflex sympathetic dystrophy." CX 19 at 17. Dr. Brenner did not feel "comfortable" rating Claimant's degree of impairment, since he did not use the current AMA Guide in his practice. CX 19 at 19. Dr. Brenner noted that he had "some experience" with RSD and Raynaud's phenomenon. CX 19 at 57. He went on to testify that the symptoms of Raynaud's phenomenon include pain and swelling with occasional discoloration, limited mobility and use of a body part. CX 19 at 43.

On cross-examination, Dr. Brenner testified that he diagnosed Claimant with a possible Raynaud's phenomenon because "somebody brought it up as a possibility." CX 19 at 42. Dr. Brenner indicated that RSD and Raynaud's phenomenon are similar, but could not expound as to the similarities because he is "not a rheumatologist." CX 19 at 43. He further could not opine as to the cause of Claimant's possible Raynaud's phenomenon; Dr. Brenner himself admitted that the Raynaud's phenomenon was not his diagnosis. CX 19 at 45. He also testified that he did not feel "comfortable diagnosing RSD." CX 19 at 59. Dr. Brenner testified that he had performed "several thousands" carpal tunnel releases, and could not identify any of those surgeries having resulted in either a Raynaud's phenomenon or RSD diagnosis. CX 19 at 45.

Dr. Brenner further stated that if Raynaud's phenomenon was somehow attributable to Claimant's surgery, there would be no medical explanation as to why Raynaud's phenomenon would develop simultaneously in both hands rather than staggered with the gap of six months between the two surgeries. CX 19 at 43-44. Dr. Brenner testified that Claimant's release procedures were otherwise successful although Claimant complained of pain and swelling in his hand with minimal use of them, and Dr. Brenner did not know to what those complaints were attributable. CX 19 at 46-47. In fact, Dr. Brenner opined that it was inconsistent with the nature of carpal tunnel syndrome and carpal tunnel release procedures for Claimant's subjective complaints of pain and swelling in his hands to have worsened from July 2003 through October 2003. CX 19 at 58. Dr. Brenner could not give an opinion as to whether he thought that Claimant was malingering and stated that he did not list swelling of Claimant's hands as an objective finding and did not see Claimant's hands as swollen at any time. CX 19 at 53. Furthermore, Dr. Brenner opined that throughout the course of his treatment of Claimant, he never noticed any symptoms, such as a change in the sweat patterns in Claimant's hands, consistent with RSD. CX 19 at 49-50.

Dr. Brenner finally opined that the difference between Claimant's July 16 and October 6 grip strength readings was insignificant given the 5 pounds standard variant in doing grip strength but that the difference between Claimant's August 6, 2003 readings for grip strength of 85 right and 75 left versus his November 25, 2003 readings of 30 pounds bilaterally was more

significant. CX 19 at 48-49. Dr. Brenner stated that Claimant would be able to occasionally lift 10 to 20 pounds, drive and input information into a computer.[4] CX 19 at 52.

Dr. Sherman also testified by deposition, taken on December 11, 2003. CX 20. He testified that following Claimant's surgeries, Claimant had reported swelling, pain and burning. CX 20 at 11. Dr. Sherman would currently diagnose Claimant with RSD, anxiety, episodic insomnia and depression. CX 20 at 11-12. He opined that Claimant did not have Raynaud's syndrome because his symptoms were not consistent with that diagnosis. CX 20 at 12. He concurred with both Dr. Salick's diagnosis of RSD and his recommended treatment with medications and nerve blocks. CX 20 at 13. Because Claimant "ought to proceed with the recommendations of Dr. Salick," Dr. Sherman opined that Claimant was temporarily disabled and had not reached maximum medical improvement. CX 20 at 14. He opined that Claimant "is not capable at this time of returning to his line of work and doing mechanical work." CX 20 at 17. Dr. Sherman also stated that it was "possible" for carpal tunnel surgery to lead to RSD, but would defer to Dr. Salick as to whether Claimant's RSD was caused by his carpal tunnel releases. CX 20 at 17-18. On cross-examination, Dr. Sherman testified that he did agree with Dr. Salick's opinion that the RSD occurred as a result of the surgery. CX 20 at 55.

Dr. Rosenberg testified by deposition taken December 5, 2003. EX 15. Dr. Rosenberg noted that the causes of Raynaud's phenomenon are unknown, but specifically opined that Claimant's surgeries did not lead to Raynaud's phenomenon. EX 15 at 13. He admitted the medical possibility of causation, but given Claimant's symptoms, opined that the surgery and Raynaud's phenomenon were unrelated. EX 15 at 14. Dr. Rosenberg noted that Claimant's Raynaud-type symptoms manifested bilaterally at the same time, and his surgeries had been performed six months apart. *Id.* He explained:

> If it [Raynaud's phenomenon] were a complication or a residual or problem associated with the surgery, you would expect it to come on at an equal interval, right side and left side. So if the right sided surgery was done first, you would expect a vascular complication to occur at a fixed time after the first surgery on the right, and then the problem to occur on the left side at the same interval after the left surgery as opposed to both problems occurring in the right and left side at the same time.

EX 15 at 14. Dr. Rosenberg further explained that the long interval of nine months following the right carpal tunnel surgery and the onset of Raynaud-type symptoms "indicates with a great deal of certainty that the surgery was not the inciting factor causing this problem." EX 15 at 14-15. Dr. Rosenberg further stated that Claimant's Raynaud's phenomenon does not impair Claimant's ability to work, thus he would not impose a work restriction. EX 15 at 17. He indicated that Claimant should be referred to a vascular surgeon, but on a non-industrial basis. *Id.*

[4] Claimant testified at hearing on October 29, 2003 that "driving down the road, I'll have to put my hands between the spokes of the steering wheel when my hands get tired from gripping the steering wheel." TR at 70. At Dr. Brenner's deposition, however, he stated that Claimant never talked to him about needing to put his hands through the steering wheel of his car to drive. CX 19 at 54.

Dr. Rosenberg disagreed with Dr. Salick's diagnosis of RSD, because Claimant's symptoms were not suggestive of RSD; Claimant did not have the "typical findings of excessive pain with stimulation of the involved area, change in sweat pattern in the involved area." EX 15 at 15, 21. Even if Claimant had RSD, Dr. Rosenberg opined that it would be unrelated to the release procedures since the RSD "would have occurred on the right side shortly after surgery and increased accordingly, and then it would have appeared on the left side in a similar manner." EX 15 at 22. On cross-examination, Dr. Rosenberg iterated that, beyond a reasonable medical doubt, Claimant does not have RSD. EX 15 at 34. He again explained that RSD "doesn't just appear spontaneously. It is a direct sequelae of trauma generally not particularly severe trauma, and there is a development of this condition after that event of trauma, a temporal development. We don't see anything like that here." EX 15 at 34.

At trial, Claimant testified that the condition of his hands since April or May 2003 were hot, swollen and aching. TR at 70. Claimant stated his hands felt "like balloons, ready to burst." *Id.* He testified that the major problem he experienced was that his "hands are achy, the burning, the swelling and the discoloration. The cramping of the muscles [of Claimant's hand and thumb]." *Id.*

Between the end of June 2001 and to September 2002, Claimant was absent on 41 occasions. CX 8. On cross-examination, Claimant testified that most of the absences occurred on Fridays because "of my condition—when the carpal tunnel was happening, towards the end of the week, as I accumulated usage of my hands, that's—my hands really began to bother me […] And what happens with the carpal tunnel situation is you rest on the weekend. But come Monday, Tuesday, you're very fresh." TR at 79. When asked why Claimant had also intermittently taken Mondays off, he stated that it depended on the severity of his condition. *Id.*

In a supplemental report dated January 7, 2004, Dr. Salick repeated his initial opinions and diagnosis of Claimant with RSD. CX 15 at 198-203.

Vocational Evidence

At Employer/Carrier's request, Ms. Lorika Loumakis, a qualified rehabilitation representative, performed a labor market survey. EX 12 at 104; EX 13. In her October 23, 2003 report, Ms. Loumakis identified 11 positions in the categories of auto mechanic ($8-30/hr); teacher assistant/lab technician ($15-26/hr); service advisor/writer ($30,000-70,000/yr); store manager, car parts (minimum wage); and driver/transporter (minimum wage). EX 13 at 108-129. Of these positions, four were located in Ventura; three in Oxnard; one in La Puente; one in Los Angeles; one in Camarillo; and lastly, one in Pasadena. *Id.* Ms. Loumakis testified that considered Claimant's education, age and extensive mechanical experience in identifying the jobs. EX 15 at 12, 75-76. She admittedly never met Claimant, although did not feel "hindered" by that fact. EX 15 at 10. As to medical restrictions, Ms. Loumakis relied on Employer counsel's representations that Claimant was permanent and stationary, without medical restrictions, per Dr. Rosenberg's opinion. EX 15 at 9-11. She further considered "possible hand limitations" in her research. EX 15 at 12, 45. On cross-examination, Ms. Loumakis testified that given lifting restrictions of no more than 20 pounds, and avoidance of repetitive use of hands, Claimant would

not be able to perform the identified mechanic positions but did not specifically rule out the other categories of work. EX 15 at 31-32, 65.

Ms. Joyce Johnson, a certified rehabilitation counselor and disability management specialist, testified by deposition taken December 23, 2003. CX 21. Ms. Johnson was assigned Claimant's case through the Department of Labor on October 22, 2003. CX 21 at 6, 19. In determining whether Claimant was an appropriate candidate for vocational rehabilitation, Ms. Johnson reviewed the medical reports of Drs. Salick and Brenner indicating, *inter alia,* that Claimant was totally temporarily disabled and had lifting and gripping restrictions. CX 21 at 10-11. Based on those reports, she did not recommend vocational rehabilitation. CX 21 at 11. Ms. Johnson further testified that Claimant is not in any formal training program. CX 21 at 19.

CONCLUSIONS OF LAW

Credibility

I am entitled to determine the credibility of the witnesses, to weigh the evidence and draw my own inferences from it, and I am not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). In addition, as the factfinder, I am entitled to consider all credibility inferences, and can accept any part of an expert's testimony or reject it completely. See *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988)

Claimant

In the instant case, Claimant underwent a left carpal tunnel release with Dr. Brenner on April 18, 2003, and thereafter noticed that the "tingling and numbness" in his left hand ended. TR at 68; CX 11 at 152(b). Claimant's subsequent testimony is inconsistent, however, and contradicted by other evidence in the record, undermining his credibility as to his alleged disabilities. For example, from April 2003---after his left carpal tunnel release surgery---through at least October 2003, Claimant complained of swelling in his hands and that his hands felt "like balloons ready to burst" yet his treating physician, Dr. Brenner, testified that he did not list swelling of Claimant's hands as an objective finding and did not observe Claimant's hands as swollen at any time. TR at 70, 97-98, 100; CX 11 at 152(d);CX 19 at 53. In addition, Dr. Brenner opined that Claimant's subjective complaints, including weakness, swelling and pain, were "somewhat out of proportion with his objective findings," including weakness of grip strength and post-operative scars. CX 11 at 152(c)-(d). Finally, Dr. Brenner could not give an opinion as to whether he thought that Claimant was not malingering in light of the inconsistencies between Claimant's subjective complaints and the objective evidence. CX 19 at 53.

In addition, I observed Claimant's demeanor at hearing and found him less than credible with respect to his emotional outbursts and his statement that he spent only two minutes seeing Dr. Rosenberg in September 2003 while Dr. Rosenberg testified that his examination of Claimant took 30 to 40 minutes. TR at 101, 111-113; EX 15 at 7, 9. I agree that Dr. Rosenberg

could not have performed the tests on Claimant in two minutes. Also, I find that Claimant is not credible because he seeks to recover disability benefits from February 3, 2003 through April 17, 2003, despite Claimant's admission to Dr. Brenner that the reason he could not work in February 2003 was not related to his carpal tunnel syndrome but related to Claimant's perceived hostile work environment instead. *See* EX 7 at 12.

The evidence also shows that before the carpal tunnel release surgeries Claimant had been less than a model employee; he had been reprimanded several times and earned a minimum wage even if he called in sick, the same wage he would earn on a slow day at work. TR at 73, 77. Claimant had personality conflicts with his supervisor that would seem to explain his reluctance to return to work. Yet, despite his problems with his immediate supervisor, Jo Posca, she rated Claimant's overall job performance as "fully successful" on at least three occasions, up to and including March 28, 2001. TR at 73-74; CX 6 at 70-72. In addition, Claimant regularly missed work on Fridays and Mondays thereby extending his weekend which is not indicative of a motivated employee. *See* TR at 79; CX 8 In addition, Claimant did not return to work after being cleared by Dr. Brenner in February 2003 or July 2003 either for reasons unrelated to his health or due to Claimant's fear that his symptoms would recur and his belief that he could not do mechanic work without even trying to perform the duties. *See* TR at 60-64; 82-89; EX 15 at 30-32; CX 11 at 119. I find that rather than his carpal tunnel surgeries, Claimant did not return to his position as mechanic in October 2003 because of his personality conflicts with Employer or due to the Raynaud phenomenon or RSD that developed no earlier than August 2003 and was unrelated to his employment.

Drs. Brenner and Rosenberg's testimony that in all of their experience they could not recall anyone developing either RSD or Raynaud's phenomenon as a direct result of carpal tunnel release surgery also contradicts Claimant's subjective complaints of increased pain and swelling after the left carpal tunnel release surgery. CX 19 at 45. Dr. Brenner also testified that Claimant first reported that his hands were painful and weak in July 2003 but that Claimant's grip strength was recorded at 90 pounds on the right and 80 pounds on the left as of July 16, 2003. CX 19 at 31-32, 47-48. Claimant's grip strength did not actually decrease significantly until his September 4, 2003 visit with Dr. Rosenberg where his grip strength was measured at 40/46/55 pounds on the right and 50/50/48 pounds on his left. CX 19 at 52; EX 6 at 5d. Even in October 2003, Claimant's grip strength was 60 pounds on the right and 55 pounds on the left (CX 19 at 48) when similar grip strengths in February 2003, resulted in Dr. Brenner's opinion that Claimant had no problems with his right hand. CX 19 at 37-38. By November 25, 2003, Claimant's grip strength had dipped down to 30 pounds in both hands. CX 15 at 193; CX 19 at 48. As a result, I do not find Claimant's subjective complaints of weakness in his hands credible during the July through October 2003 time period as this contradicts the objective evidence.

Finally, there was a visit by Claimant with Dr. Brenner on October 20, 2003 on the eve of hearing in this case despite Dr. Brenner's request that Claimant not return for two months. See CX 11 at 111(c). Claimant's subjective complaints basically remained the same as his prior October 1 visit but at his October 20, 2003 visit, his attorney accompanied him. CX 19 at 40. As referred to above, this is a visit where Dr. Brenner opined that Claimant's subjective complaints were out of proportion to the objective findings. *See* CX 11 at 152(c)-(d). I find that the Employer having replaced Claimant with a new mechanic as of October 6, 2003 such that

Claimant's job was no longer available combined with the upcoming hearing on October 27, 2003 resulted in Claimant's exaggerated symptoms on October 20 rather than any lasting repercussions or aggravations from the bilateral carpal tunnel release surgeries.

Based on the foregoing inconsistencies in and contradictions of Claimant's statements, I find that he was not a credible witness and accord little weight to his testimony.

Dr. Salick

Similarly, I find Dr. Salick's opinions lack credibility as to Claimant's alleged condition after his second carpal tunnel release surgery. While Dr. Salick's professed expertise is in rheumatology, arthritis, fibromyalgia, carpal tunnel, overuse syndromes, RSD, autoimmune diseases and spine and extremities, he is board-certified only as a "disability analyst" as of 2002 and certified also as a Qualified Medical Expert and Independent Medical Expert. CX 15 at 205-213. In contrast, I find both Dr. Rosenberg, who is board certified in orthopedic surgery since 1983, and Dr. Brenner, who is also board certified in orthopedic surgery as of 1981, more qualified to opine about the cause, diagnosis, and prognosis of Claimant's hand and wrist conditions after carpal tunnel release surgeries as that type of surgery is what Drs. Rosenberg and Brenner perform on a daily basis in their profession. See CX 19, Exhibit 1 attached thereto; EX 11 at 103.

In addition, the timing of Dr. Salick's involvement in this case raises additional concerns as to his credibility because he was retained by Claimant after the discovery cutoff and after the conclusion of hearing in this case without my procedural approval. There was a stipulation at hearing that post-hearing depositions would go forward with a limited number of physicians and non-physicians who were active in the case before hearing with no mention of Dr. Salick by Claimant's counsel. TR at 34-37.

Furthermore, Dr. Salick gave no explanation in response to Dr. Rosenberg's credible observation that Claimant's current hand condition came on spontaneously rather than staggered appearing first in the right hand and six months later in the left hand consistent with the delay between the right and left carpal tunnel release surgeries and therefore Claimant did not have RSD caused by the carpal tunnel release surgeries. See EX 15 at 14 and 34. In addition, Dr. Salick had no explanation for the fact that Claimant did not exhibit any change in his hand sweating pattern, a symptom of RSD and, as a consequence, Dr. Rosenberg opined that Claimant did not have RSD as a result of the carpal tunnel release surgeries. EX 15 at 15, 21. Dr. Brenner opined that throughout the course of his treatment of Claimant, he never noticed any symptoms, such as a change in the sweat pattern in Claimant's hands, consistent with Dr. Salick's RSD diagnosis. CX 19 at 49-50. Finally, the fact that both Dr. Rosenberg and Dr. Brenner had collectively performed thousands of carpal tunnel release surgeries and could not recall a single occurrence when the surgery resulted in either RSD or Raynaud's phenomenon outweighs Dr. Salick's contrary opinion as a non-surgeon. See CX 19 at 45.

As a result, I reject Dr. Salick's opinions in his November, 2003 report and his January, 2004 update, CX 15.

Drs. Rosenberg and Brenner

As referenced above, both Dr. Rosenberg and treating physician, Dr. Brenner, are board certified orthopedic surgeons qualified to opine in this matter and I find that their deposition testimony was credible and supported by the objective medical evidence.

Dr. Sherman

Finally, I find Dr. Sherman's opinions lack credibility and is given less weight than the opinions of the treating physicians Dsr. Brenner and.Rosenberg as to Claimant's carpal tunnel syndrome, alleged disability, RSD, and Raynaud's phenomenon because Dr. Sherman, an osteopath specializing in Family Practice (CX 20, Exhibit 1 attached thereto) with no expertise in orthopedic surgery, is unqualified to opine as to causation in this case. In addition, Dr. Sherman deferred to other physicians and admitted that he was unqualified to opine on causation matters and referred Claimant or deferred to opinions of others he believed to be more qualified to render opinions about Claimant's bilateral hand condition. CX 20 at 13, 17-18, 55. Also, Dr. Sherman has never performed carpal tunnel release procedures as performed in this case. CX 20 at 20. Furthermore, Dr. Sherman expressed his bias for Claimant and testified that he agreed to testify as an "advocate" for Claimant. CX 20 at 28-29.[5] In addition, I find that Dr. Sherman's familiarity with RSD is suspect and unreliable in light of his testimony that a change in sweat patterns is not a classic symptom of the condition which contradicts the more reliable testimony of Drs. Rosenberg and Brenner that such a change is indeed a common symptom of RSD. CX 20 at 50-51; CX 19 at 50;EX 15 at 8. It is telling that Dr. Sherman did not independently diagnose Claimant with RSD until Dr. Salick came into the case and first gave this opinion.

With the foregoing determinations in mind, I turn to the remaining issues in this case, primarily, whether there is any causal relationship between Claimant's Raynaud's phenomenon or RSD in both his hands and his employment with Employer.

Causation

Claimant contends that his current condition of reflex sympathetic dystrophy ("RSD") in both hands and related impairments were, in fact, caused, accelerated, or aggravated by the cumulative trauma he incurred from his work-related bilateral carpal tunnel release surgeries. In contrast, Employer contends that there are inadequate factual, medical, and scientific bases for concluding that Claimant's work duties and carpal tunnel syndrome/surgeries established or raised any sort of causal relationship to his current condition.

[5] This "advocacy" can be seen in the contradictions between the doctor's testimony on direct, when he testified that he could not say with "any certainty" what caused the alleged RSD, and on cross-examination when he stated that he agreed that the RSD was caused by the carpal tunnel release procedures. (Compare CX 20 T 17-18 with CX 20 at 51-52.

[7] Employer actually argues that Claimant's TTD started on November 25, 200*3*, the date of Claimant right carpal tunnel release surgery. This is obviously in error as the date of Claimant's right carpal tunnel release surgery was November 25, 2002, a year earlier. TR at 58; EX 11 at 139.

The Section 20(a)Presumption Has Been Established

Claimant asserts that Dr. Rosenberg's report and testimony are insufficient to sever the connection between Claimant's work-related carpal tunnel syndrome and his current RSD condition. In determining whether an injury is work-related, Claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case, *i.e.*, the claimant demonstrates that he suffered harm and that the conditions existed at work which could have caused that harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is disputed whether Claimant suffers from a disabling RSD condition, but after the hearing he did submit Dr. Salick's November 25, 2003 report stating that Claimant suffers from RSD, thereby establishing a harm. See *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). I also find that Claimant developed bilateral carpal tunnel syndrome as of May 31, 2001 while working for Employer. *See* TR at 56; CX 2 at 13-21; ALJX 5 at 4. I find that the Section 20(a) presumption is invoked here as evidence has been presented showing that Claimant's current Raynaud's phenomenon or RSD condition prevent him from working and are related to or the result of the surgery to treat Claimant's work-related carpal tunnel syndrome. CX 15 at 194. Moreover, Employer concedes that Claimant has presented a *prima facie* case invoking the presumption that his post-second carpal tunnel release complaints are compensable. ALJX 5 at 11. As such, I find that Claimant has established a *prima facie* case to apply the Section 20(a) presumption.

Employer Has Rebutted The Section 20 (a) Presumption

Despite Claimant having established a *prima facie* case, Employer has rebutted the Section 20(a) presumption with the credible opinions of Dr. Rosenberg and Dr. Brenner. Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury or harm is not related to the employment. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990)(emphasis added)*; O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director, OWCP,* 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976).The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Employer can rebut the presumption by producing substantial evidence that claimant's disabling condition was caused by a subsequent non work-related event which was not the natural or unavoidable result of the initial work injury. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

In order to rebut the Section 20(a) presumption, an employer must present substantial evidence that severs the causal nexus. *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The Fifth Circuit has held that an employer need not "rule out" the employment as a cause; instead, an employer must produce substantial evidence that employment is not the cause. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999). Under this standard, it is sufficient if a physician unequivocally states, to a reasonable degree of medical certainty, that the harm is not related to the employment. *O'Kelley*, 34 BRBS at 41-42. An employer need not establish another agency of causation to rebut the Section 20(a) presumption. *Id.* at 41; *see Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982) (Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984).

In this case, Employer submitted Claimant's medical records together with the report and deposition testimony of the board certified orthopedic surgeon, Dr. Rosenberg. CX 11; EX 6,7 & 15. Dr. Rosenberg diagnosed Claimant in September 2003 as suffering from Raynaud's phenomenon and that the causes of Raynaud's phenomenon are unknown, but specifically opined that Claimant's carpal tunnel release surgeries did not lead to Raynaud's phenomenon. EX 15 at 13. He admitted the medical possibility of causation, but given Claimant's symptoms, opined that the surgery and Raynaud's phenomenon were unrelated. EX 15 at 14. Dr. Rosenberg noted that Claimant's Raynaud-type symptoms manifested bilaterally at the same time, and his surgeries had been performed six months apart. *Id.* He explained if Raynaud's "were a complication or a residual or problem associated with the surgery, you would expect it to come on at an equal interval, right side and left side. So if the right-sided surgery was done first, you would expect a vascular complication to occur at a fixed time after the first surgery on the right, and then the problem to occur on the left side at the same interval after the left surgery as opposed to both problems occurring in the right and left side at the same time." EX 15 at 14. Dr. Rosenberg further explained that the long interval of nine months following the right carpal tunnel surgery and the onset of Raynaud-type symptoms "indicates with a great deal of certainty that the surgery was not the inciting factor causing this problem." EX 15 at 14-15.

Finally, Dr. Rosenberg disagreed with Dr. Salick's diagnosis of RSD, because Claimant's symptoms were not suggestive of RSD; Claimant did not have the "typical findings of excessive pain with stimulation of the involved area, change in sweat pattern in the involved area." EX 15 at 15, 21. Even if Claimant had RSD, Dr. Rosenberg opined that it would be unrelated to the release procedures since the RSD "would have occurred on the right side shortly after surgery and increased accordingly, and then it would have appeared on the left side in a similar manner." EX 15 at 22. On cross-examination, Dr. Rosenberg repeated that, beyond a reasonable medical doubt, Claimant does not have RSD. EX 15 at 34. He again explained that RSD "doesn't just appear spontaneously. It is a direct sequelae of trauma generally not particularly severe trauma, and there is a development of this condition after that event of trauma, a temporal development. We don't see anything like that here." EX 15 at 34.

Stated differently, the unequivocal testimony of Dr. Rosenberg that no relationship exists between Claimant's May 30, 2001 work-related carpal tunnel syndrome or the subsequent

release surgeries and his developing either Raynaud's phenomenon or RSD, is sufficient to rebut the Section 20(a) presumption. *See Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997). As Dr. Rosenberg's opinion severs the causal link between Claimant's Raynaud's phenomenon or RSD and his employment, I find that Employer has successfully rebutted the Section 20(a) presumption. *See Coffee v. Marine Terminals Corp*, 34 BRBS 85, 86-87 (2000); *Phillips v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 94, 96 (1988).

After Weighing the Evidence, Claimant Has Failed to Establish That His Current Bilateral Hand Condition Arose or Became Aggravated Out of His Employment With Employer

If the administrative law judge finds that the Section 20(a) presumption is rebutted, the judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); see also Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).* If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994*).* It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

After considering at length all of the medical evidence of record, I credit the opinions of Dr. Rosenberg and treating physician Dr. Brenner over the contrary opinion of Dr. Salick, because Dr. Rosenberg possesses superior credentials and Dr. Rosenberg's opinions were more detailed and better reasoned, well-documented, and supported by the record. Dr. Rosenberg is Board-certified in orthopedic surgery and has performed the exact carpal tunnel release surgery at issue in this case many times before. He based his opinion regarding the absence of a causal relationship between Claimant's current medical conditions and his prior employment on a lack of staggered symptoms and objective evidence showing Raynaud's phenomenon or RSD in Claimant's right hand/wrist before the same developed conditions in his left hand/wrist. See EX 15 at 22. Also there is an absence of a change in Claimant's sweat pattern and minimal objective evidence connecting Claimant's current conditions to his employment. I agree with Dr. Rosenberg's finding that Claimant's condition in this case was not caused by his employment or subsequent carpal tunnel release surgeries and that Claimant's conditions have progressed despite his recovery from his carpal tunnel release surgeries. *See* EX 15 at 13-15, 21-22, 34; *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Cordero v. triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978).

Treating physician Dr. Brenner did not opine that Claimant's current conditions are causally connected with his employment as a mechanic. He simply relied on Claimant's own reports and did not elicit substantial objective evidence to satisfy Claimant's burden of proof for

establishing a causal connection between his current conditions and his prior employment. Dr. Brenner did not observe swelling, discoloration or temperature change in Claimant's hands. Dr. Brenner's grip strength measurements for Claimant did not become notably compatible to Claimant's alleged weakness as even at his October 20, 2003 examination he found Claimant "had good range of motion in his hands and reasonable grip strengths." CX 19 at 45-46.

I decline to rely upon the contrary opinion of Dr. Salick, having rejected his opinions and reports for the reasons stated in my credibility discussions above. Accordingly, after considering all of the evidence of record, I find that Claimant's present medical condition, be it Raynaud's phenomenon or RSD, is not related to his employment with employer and that Claimant did not retain any continuing disability after July 16, 2003 as a result of his underlying work-related carpal tunnel syndrome and the subsequent treatment. Furthermore, after crediting Dr. Rosenberg's and Dr. Brenner's comprehensive medical testimony including their extensive, objective medical records, over that of Dr. Salick, Claimant did not meet his burden of persuasion in this case. Accordingly, Claimant's temporary total disability claim from October 21, 2003 through the present is denied as is his remaining claim for ongoing medical benefits from October 21, 2003 to the present.

Nature and Extent of Disability

Employer concedes that Claimant is entitled to temporary total disability benefits from November 25, 2002, the date of his right carpal tunnel release surgery, through February 2, 2003. ALJX 5 at 19.[7] Furthermore, Employer admits Claimant's entitlement to temporary total disability benefits from April 18, 2003, the date of Claimant's left carpal tunnel release surgery, through July 13, 2003, "the day before the date that Dr. Brenner initially released Claimant to return to work with the anticipation that he would be able to do the work 'without any problems.' [citations omitted]" ALJX 5 at 19-20; CX 19 at 30; CX 11 at 119. Therefore, with respect to causation, we are only concerned with Claimant's post-hearing argument that he remained temporary totally disabled subsequent to July 13, 2003 through the present.

Claimant contends that his work-related impairments did not reach the point of maximum medical improvement after his left carpal tunnel release surgery in April 2003 and that he remains temporarily totally disabled. ALJX 4 at 44, 46. In contrast, Employer contends that any work injury Claimant suffered reached the point of maximum medical improvement on June 1, 2003, or alternatively by July 13, 2003, when treating physician Dr. Brenner opined that Claimant would be ready to return to work with no restrictions. CX 11 at 119-20; EX 6 at 5g; EX 15 at 8; ALJX 5 at 18.

A disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). *See also Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984)(physician's evaluations of Claimant indicated that his heart condition, although improved, was of indefinite duration); *Air America,*

Inc. v. Director, OWCP, 587 F.2d 773, 781-82 (1st Cir. 1979); *Care v. Washington Metr. Area Transit Auth*., 21 BRBS 248, 251 (1988).

Permanency does not, however, mean unchanging. Permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date. *Watson,* 400 F.2d at 654; *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988); *Brown v. Bethlehem Steel Corp*., 19 BRBS 200, 204, *aff'd on recon*, 20 BRBS 26 (1987). Likewise, a prognosis stating that chances of improvement are remote is sufficient to support a finding that a claimant's disability is permanent. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442, 445 (1981); *Johnson v. Treyja, Inc*., 5 BRBS 464, 468 (1977).

The question of whether a claimant's condition has reached the point of maximum medical improvement is primarily an issue of fact and must be resolved on the basis of medical rather than economic evidence. *See Williams v. General Dynamics Corp.,* 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp*., 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *See Brown,* 19 BRBS at 204. A condition is not permanent, however, as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *See Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom, Louisiana Insurance Guaranty Ass'n. v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

As aforementioned, with the exception of the rejected CX 15, Dr. Rosenberg opines that Claimant's bilateral carpal tunnel syndrome had resolved as of June 1, 2003 and, as a result, Claimant reached maximum medical improvement (MMI) as of June 1, 2003, and his continuing bilateral hand problems were in no way related to any continuing bilateral carpal tunnel syndrome condition. Claimant was simply recovering from his left carpal tunnel release surgery as he had done with his right release surgery by February 2, 2003. *See* EX 11 at 135.

In contrast to Dr. Rosenberg's June 1, 2003 MMI date, Dr. Brenner examined Claimant on June 6, 2003 and opined that Claimant could expect to return to work as a mechanic with no restrictions on July 14, 2003 as part of the same left release surgery recovery process. CX 19 at 30; EX 11 at 119. I find Dr. Brenner's opinion concerning Claimant's recovery from left release surgery and his ability to return to work with no restrictions on July 14, 2004 more consistent with Claimant's right hand recovery (approximately 10 weeks) on February 3, 2003 after his carpal tunnel release surgery. Dr. Brenner's opinion, therefore, is better reasoned than Dr. Rosenberg's opinion concerning June 1, 2003 as the MMI date. Moreover, Dr. Brenner examined Claimant on July 16, 2003 and found his grip strength to have improved and reached a plateau at 90 pounds for his right hand and 80 pounds for his left hand. CX 19 at 47-49.

Dr. Brenner also testified that Claimant's subjective complaints at the July 16 exam may have resulted in Dr. Brenner's revised opinion that Claimant would probably need vocational rehabilitation and restricted work hours. CX 19 at 32. Dr. Brenner, in response to Claimant's subjective complaints, also believed that it would take 8 more weeks for a determination for

permanent and stationary condition. CX 11 at 114-15. Dr. Brenner testified that he would normally wait 3 to 4 months after a carpal tunnel release surgery before diagnosing a permanent and stationary condition status. CX 19 at 33. This opinion is in conflict with Dr. Brenner's earlier opinion after Claimant's right carpal tunnel release surgery on November 25, 2002, where Dr. Brenner diagnosed Claimant's permanent and stationary condition status less than two and a half months later on February 3, 2003. EX 7 at 10-12; *See also* EX 7 at 9 (Dr Brennan opined TTD for approx. 6 weeks from surgery). I choose to follow Dr. Brenner's first recovery period of 10 weeks that actually occurred with the right carpal tunnel release surgery over the revised 4-5 month period.

I discredit and give no weight to the opinions of Drs. Brenner, Salick, and Sherman that Claimant should not engage in the type of work performed by a mechanic on or after July 16, 2003, as their opinions were improperly based upon Claimant's own dubious representations regarding his alleged symptoms and thus were not premised on any objective evidence. I note that none of the truly objective evidence, *i.e.*, the Claimant's grip strength tests, the post-surgery negative Tinel and Phalen tests, the lack of swelling, the lack of staggered onset of Raynaud's phenomenon or RSD, and the lack of changed sweat patterns, suggest that Claimant had any form of disability. In contrast, I credit and rely on the opinions of Drs. Rosenberg and Brenner as of June 6, 2003 before Claimant's subjective complaints interfered with his opinions based on the objective evidence showing Claimant as capable of returning to his work as a mechanic. Even if Claimant's hand conditions deteriorated after July 16, 2003 so that he could no longer perform the duties of a mechanic, Claimant has failed to show that this deterioration was caused by his employment or the subsequent treatment involving bilateral carpal tunnel release surgeries.

I find the opinions of Drs. Rosenberg and Brenner better reasoned, more credible and detailed, and more consistent with the record than the opinions of Drs. Salick and Sherman. The opinions of Drs. Rosenberg and Brenner therefore outweigh the opinions of Drs. Salick and Sherman. As a result, I conclude that Claimant reached MMI with regard to his work-related condition and the left surgical carpal tunnel release as of July 16, 2003 when his recovery from left carpal tunnel release surgery was complete. CX 11 at 119; EX 6 at 5g; EX 15 at 8;

Average Weekly Wage

Both parties stipulated that Section 10(c) of the Act applies here for calculation of Claimant's average weekly wage. TR at 21-22. I find that in furtherance of this stipulation, there is no evidence of the actual number of days Claimant worked in order to apply Section 10(a). *See Taylor v. Smith & Kelly*, 14 BRBS 489 (1981). In addition, I find that Section 10(b) is also inapplicable since the record does not contain the wage information of a similar employee, which is necessary to perform a Section 10(b) calculation. Also, I reject Employer's EX 8 at 13-14 as being incomplete as it does not contain information of Claimant's wages for the 52 week period preceding his May 30, 2001 injury.

In a case where neither Section 10(a) nor Section 10(b) applies, average annual earnings should be calculated under Section 10(c), and then divided by 52 consistent with Section 10(d).

Nielson v. Weeks Marine, Inc., BRB No. 98-1240 (1999). Under these provisions, I may use Claimant's actual annual earnings divided by 52 to calculate his average weekly wage. *Gilliam v. Addison Crane Co*., 21 BRBS 91, 92-93 (1988). Extrapolating Claimant's 2000 and 2001 earnings results in a 52 week rounded total of $31,200 for the time period of May 31, 2000 through May 30, 2001. CX 10 at 110-11; ALJX 4 at 37. Dividing $31,200 by 52 weeks results in an average weekly wage of $600. Multiplying this by two-thirds equals a compensation rate of $400.00 per week.

Medical Benefits

Section 7(a) of the Act provides that "[t]he employer shall furnish medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. *See Maguire v. Todd Shipyards Corp*., 25 BRBS 299 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981)(Miller, J., dissenting), *rev'd* on other grounds, 682 F.2d 968 (D.C. Cir. 1982). Where a claimant's request for authorization is refused by the employer, however, claimant is released from the obligation of continuing to seek approval for subsequent treatment and thereafter need only establish that the treatment subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989).

Under Section 7(d)(2) of the Act, an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. The Secretary may excuse the failure to comply with the provisions of this section in the interest of justice. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1985); *Force v. Kaiser Aluminum & Chemical Corp*., 23 BRBS 1 (1989), *aff'd* in pertinent part, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991); 20 C.F.R. §702.422. The Board has held that the authority to determine whether non-compliance with Section 7(d)(2) may be excused rests with the district director and not the administrative law judge. *See Krohn v. Ingalls Shipbuilding, Inc.,* 29 BRBS 72, 75 (1995)(McGranery, J., concurring in part and dissenting in part); *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting). A decision of the district director will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Sans v. Todd Shipyards Corp.,* 19 BRBS 24 (1986).

Here, Employer refused to authorize treatment as early as July 2001, in which case Claimant is released from the obligation to seek approval for subsequent treatment and need only establish that the treatment he subsequently procured was reasonable and necessary for his injury. *See Schoen*, 30 BRBS at 112; *Anderson*, 22 BRBS at 20. Moreover, I find that Dr. Sherman's referral in February 2002 to Dr. Brenner as a specialist compelled Employer to consent *See Armfield*, 25 BRBS at 303; *Senegal,* 21 BRBS at 8. Based on the foregoing, I find that Claimant is entitled to reimbursement for treatment provided by Dr. Vannix, Dr. Kong, Dr.

Sherman up through his referral to Dr. Brenner, and Dr. Brenner through his July 16, 2003 examination. Substantial evidence exists in support of this finding as the District Director directed Employer to pay these expenses when reviewing the case in September 2001. CX 1 at 11-12. In addition Employer's witness, Mr. Comer testified that at least through December 2002, Claimant had submitted doctor's notes to Employer. EX 16 at 40. Finally, Claimant was credible when he testified that he reported his May 2001 hand injuries to Employer on at least three separate occasions. TR at 54.

Based on the record as a whole, I find that claimant showed good cause and the District Director agreed, pursuant to Section 7(d) to excuse any failure to continue to timely file the attending physician's reports. I find that Claimant advised Employer of his work-related injury in a timely manner, he requested appropriate medical care and treatment, and Employer did not accept the claim and did not authorize any such treatment. Consequently, I conclude that Employer shall immediately authorize and pay for the reasonable and necessary medical care and treatment in the diagnosis and treatment of Claimant's carpal tunnel syndrome and related release surgeries commencing on May 31, 2001 through July 16, 2003. Accordingly, my general finding that Claimant is entitled to medical benefits is subject to the parties reaching an agreement for specific expenses for medical treatment consistent with this decision and may raise issues regarding non-compliance with Section 7(d)(2) before the district director.

Interest

I find Claimant entitled to interest in this case. Employer contends that interest is not specifically authorized by the Act, and that the presumed reason for assessing interest, *i.e.*, to protect claimant in instances where the employer controverts a claim without basis, is not applicable to this case since employer's reasons for controversion were valid.

While there are no provisions in the Act requiring payment of interest on unpaid installments of compensation past due, the courts have held that unless interest is awarded on delayed payments, the claimant does not receive the full amount of compensation due. *See generally Quave v. Progress Marine,* 918 F.2d 33, 24 BRBS 43(CRT), on rehearing, 921 F.2d 213, 24 BRBS 55(CRT) (5th Cir. 1990); *Quick v. Martin*, 397 F.2d 1225 (5th Cir.1971); *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971). In the instant case, I have determined that Claimant was entitled to benefits from November 25, 2002 through February 2, 2003 and April 18, 2003 through July 16, 2003, and that Employer shall pay to Claimant interest on any unpaid compensation benefits. Claimant is entitled to interest on any overdue payments. Moreover, 28 U.S.C. § 1961 is applicable to determine the proper rate of interest to be applied to installments of past due compensation rate. *Grant v. Portland Stevedoring Co*., 16 BRBS 267 (1984*), aff'd* on recon., 17 BRBS 20 (1985). Accordingly, interest owed, if any, is to be calculated pursuant to the applicable rate set out by 28 U.S.C. §1961

Employer Did Not Terminate Claimant's Employment In Violation Of Section 48a Of The Act.

Section 48a of the Act provides, in pertinent part, that it is unlawful for an employer "to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer." 33 U.S.C. § 948a. In order to establish a *prima facie* case under Section 48a, a claimant must prove that the employer committed a discriminatory act motivated by a discriminatory animus or intent. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 3 (1992) *aff'd sub nom. Brooks v. Director, OWCP* 2 F.3d 64, 27 BRBS 100 (CRT) (4th Cir. 1993). A "discriminatory act" has been defined as the "different treatment of like groups or individuals." *Holliman v. Newport News Shipbuilding & Dry Dock*, 852 F.2d 759, 761 (4th Cir. 1988). An administrative law judge may infer animus from circumstances demonstrated by the record. *Id*. Thus, the circumstances of a claimant's discharge may be examined to determine whether an employer's reasons for firing an employee are credible or a mere pretext for a termination that was actually motivated at least in part by the filing of a compensation claim. *Id*. Moreover, in cases in which the evidence shows that an employer had a general animus against a claimant, such as an animus that may have stemmed from causes other than the claimant's application for workers' compensation benefits, the burden is shifted to the employer to prove that it was not motivated, even in part, by the claimant's exercise of his rights under the Act. *Geddes v. Benefits Review Board*, 735 F.2d 1412, 1417-18 (D.C. Cir. 1984).

In this case, Claimant asserts that Employer's termination of Claimant's employment in October 2003 was in retaliation for having made a claim for benefits under the Longshore Act. Employer contends that the job loss was solely the result of Claimant's unavailability and the lack of communication from February 2003 through October 2003 when Claimant was replaced as a mechanic. Claimant was released to work as a mechanic with no restrictions by treating physician Dr. Brenner as of February 3, 2003. EX 11 at 135; EX 12 at 160. He did not work from February 6 through his left carpal tunnel release surgery on April 18, 2003 with no medical excuse. Claimant did not comply with or properly respond to Employer's February 27, 2003 letter. CX 12 at 160. At no time was Claimant told that the sexual harassment claim filed against him leading to his September 2002 suspension was related to his claim in this action. TR at 103-104. Claimant has failed to provide any evidence showing that Employer discriminated again Claimant or treated Claimant differently than any other employee sufficient to raise a prima facie case of discrimination under Section 48a of the Act.

In addition, Mr. Comer, of Employer, testified that from February 2003 on, he had no information from Claimant that "excused those [Claimant] absences from that time period." EX 16 at 40. According to his letter dated August 27, 2003, giving a 30-day advance notice of proposed termination, Mr. Comer stated that Claimant had been absent from work since February 5, 2003 but "[t]he last medical report we received regarding your status was dated 6 August 2003 from Dr. Brenner…indicating that you are still unable to work." CX 12 at 153. Prior to this correspondence, Ms. Jo Posca sent Claimant a letter dated February 27, 2003 directing Claimant to submit a doctor's certificate indicating the nature of his illness as well as the expected return to work date. CX 12 at 160. According to Mr. Comer, Ms. Posca had retired in March/April 2003, prior to Claimant's termination. EX 16 at 11. Mr. Comer testified that

Employer needed a mechanic to service its people and replaced Claimant's position with a new mechanic as Claimant had a number of unexcused absences prior to his termination in 2003. EX 16 at 52-53. Claimant attorney also wrote to Employer on August 7, 2003 stating that Claimant probably will not be able to return to work as an automobile mechanic. CX 12 at 157.

I find that Employer had a good faith belief that Claimant had exhausted his sick leave and had been absent from full time work since November 22, 2002 except for a half day worked on February 5, 2003. See CX 12 at 152(e), (f), 153, and 160. I find Employer's policy as to Claimant's termination to be nondiscriminatory. Even if there was evidence of discriminatory treatment by Employer toward Claimant, the record lacks any evidence that Employer was motivated by discriminatory animus or intent. Claimant was not a credible witness as to his own account of alleged discriminatory conduct. Accordingly, I find that Claimant has failed to meet his burden that he has been treated in a discriminatory manner or that Employer committed a discriminatory act motivated by a discriminatory animus or intent. Claimant therefore has failed to show that Employer violated Section 48a of the Act. *See Holliman v. Newport News Shipbuilding & Dry Dock,* 852 F.2d 759, 761 (4th Cir. 1988).

ORDER

Based on the foregoing findings of fact and conclusions of law, **IT IS HEREBY ORDERED** that:

1. Employer shall pay Claimant temporary total disability compensation of $400.00 per week from November 25, 2002, through February 2, 2003, and from April 18, 2003, through July 16, 2003.

2. Employer is entitled to a credit for any compensation previously paid to Claimant.

3. Employer shall provide such medical treatment as the nature of Claimant's work-related disability shall require and as described in the decision above from May 30, 2001 through July 16, 2003.

4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the OWCP shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

5. The District Director shall make all calculations necessary to carry out this Order.

6. Counsel for Claimant shall within 20 days after service of this Order submit a fully supported application for costs and fees to counsel for Employer and to the undersigned Administrative Law Judge as to the pro-rata portion of his incurred fees and costs associated the issues which were successfully litigated. Within 20 days thereafter, counsel for Employer shall provide Claimant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within 20 days after receipt of such objections, Claimant's counsel shall verbally discuss each of the objections with

counsel for Employer. If the two counsel disagree on any of the proposed fees or costs, Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Claimant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Employer. Counsel for Employer shall have 15 days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

IT IS SO ORDERED.

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GERALD M. ETCHINGHAM
Administrative Law Judge